PETALING TIN BHD.

v.

LEE KIAN CHAN & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
SHAIK DAUD ISMAIL J
[CIVIL SUIT NO. D1-24-201-91]
23 JULY 1992

CIVIL PROCEDURE: *Originating summons - Declaration sought - Whether plaintiff under a legal duty to refuse to register share transactions - Whether decisions of Malaysian Panel on Take-Overs and Mergers applied - Plaintiff sought ruling from the Panel on the effect of r. 34.7 of the Malaysian Code on Take-Overs and Mergers - Plaintiff disagreed with the ruling and contended that Panel had acted outside its jurisdiction - Defendant contended s. 179(8) of Companies Act 1965 precluded judicial review of Panel's decision - Judge held that amendment to Article 121(1) of the Constitution limited the High Court's powers to that which is to be conferred by any Federal law - Panel's decisions are final and not capable of challenge - Plaintiff's application for declaration dismissed with costs. Companies Act 1965, ss. 174, 179(2), (4)(a), (7A), (8), (9) Code on Take-Overs and Mergers r. 34.7.*

By an originating summons, the plaintiff sought a declaration that it had a legal duty to refuse to register the share transfer of the defendants and that the decisions of the Malaysian Panel on Take-Overs and Mergers on the effect of r. 34 of the Malaysian Code on Take-Overs and Mergers continued to apply to the issued share capital of the plaintiff.

A group of minority shareholders among whom were 1st and 2nd defendants had acquired $33^{1}/_{3}$% of the voting rights in the plaintiff company, which is a public listed company.

This acquisition triggered the Malaysian Code on Take-Overs and Mergers and consequently the Malaysian Panel on Take-Overs and Mergers directed the group to make a general offer as required by r. 34.1 of the Code. When there was no offer, the Panel invoked s. 179(7A) of the Companies Act 1965 (the Act) and publicly censured the minority shareholders whom it held to be concerted parties. The defendants there upon liquidated their shares and presented the share certificates to the plaintiff for registration. The plaintiff refused and held that the defendants had to comply with r. 34.7 of the Code. The plaintiff sought a ruling from the Panel on the effect of r. 34.7. The Panel ruled that r. 34.7 had ceased to have any operative force as the defendants had been publicly censured. Dissatisfied with the ruling, the plaintiff contended that the interpretation of s. 179(7A) of the Act involved a matter of law, and as such was outside the Panel's statutory jurisdiction. The plaintiff also contended that the ruling by the Panel on the effect of r. 34.7 was not a decision of the Panel and as such had no application. Alternatively, the plaintiff contended that in the event that the ruling was a decision, the Panel had acted outside its jurisdiction.

The defendants contended that s. 179(8) of the Act precludes any judicial review of the Panel on matters within its purview. Plaintiff disagreed and argued the ouster clause s. 179(8) was not strong enough to oust the Court's jurisdiction. The Court, agreeing with the defendants' submission stated that the amendment to Article 121(1) of the Constitution had restricted the High Court's judicial powers to that which is conferred by any Federal law. As the Federal law has decided that the interpretative powers of the Court shall be with the Panel, the Court held that the decisions of the Panel in the exercise of its functions shall be final and unchallengeable in the Courts. Plaintiff's application was dismissed with costs.

Held:

[1] The Panel had full authority under s. 179 of the Act to issue rulings on the interpretation of the general jurisdiction to administer the Code it formulated and may do anything for the proper exercise of its jurisdiction.

[2] Having formulated r. 34.7, the Panel must also have authority to interpret that rule. It also has immunity from legal proceedings with respect to its exercise of its functions, duties and powers (s. 174 (9)).

[3] The amendment to Article 121(1) of the Constitution had restricted the High Courts powers to those which had been conferred by any Federal law. By virtue of ss. 179(2), 4(a), (8) & (9) of the Act, the powers of interpretation of the general principles, and rules are solely vested in the Panel. Such vesting has taken away the jurisdiction of the Courts. The decisions of the Panel on all matters affecting the Code are final and not capable of being challenged in the Courts.

[**Editorial Note**: The plaintiff has made an appeal to the Supreme Court *vide* Civil Appeal No. 02-183-92]

[Plaintiff's application for declaration dismissed with costs.]

Legislation referred to:
Companies Act 1965, ss. 174(3)(a), (4)(a), 179(2), (7A), (8), (9)
Federal Constitution, art. 121(1)
Malaysian Code on Take-Overs and Mergers, r. 34.1, 34.7

For the plaintiff - Davidson (Chan Kok Keong & H.Y. Chong with him); M/s. Azman, Davidson & Co.
For the 1st & 2nd defendants - Murthi; M/s. Murthi & Partners
For the 3rd defendant - Ong Chin Beng; M/s. Ong Chin Beng & Partners

JUDGMENT

Shaik Daud Ismail J:

By an originating summons the plaintiff seeks a declaration as follows:

(i) The plaintiff is under a legal duty to refuse to register a transfer of 2,000 shares owned by the first defendant, from the 3rd defendant, to one Ng Seng Yuen under a transfer dated 12 July 1991 and presented to the plaintiff on 3 July 1991;

(ii) The plaintiff is under a legal duty to refuse to register a transfer of 250,000 shares, owned by the 2nd defendant, from the 3rd defendant to Mayban Nominees (Singapore) Pte. Ltd. under transfer dated 30 September 1991 and presented to the plaintiff on 3 October 1991;

(iii) The decisions of the Malaysian Panel on Take-Overs and Mergers on 23 February 1991 and 20 May 1991 that r. 34 of the Malaysian Code on Take-Overs and Mergers applied to the issued share capital of the plaintiff continues to apply.

The plaintiff is a public listed company and its shares are freely traded in the Malaysian Stock Market. It would appear that a group of minority shareholders and various concerted parties among whom were 1st and 2nd defendants through purchases of shares of the plaintiff company in the open market, had acquired $33^{1}/_{2}$% of the voting rights in the plaintiff company. Representations were made to the Malaysian Panel on Take-Overs and Mergers (the Panel)

that as a result the Malaysian Code on Take-Overs and Mergers (the Code) had thereby been triggered. When the Panel became aware of this they directed the group to make a general offer to the rest of the shareholders as is required by r. 34.1 of the Code. When the group failed to do so the Panel invoked s. 179(7A) of the Companies Act 1965 (the Act). This section provides that:

> (7A) Notwithstanding subsection (7), where any party concerned in a take-over or merger transaction fails to observe any of the general principles and rules in the Code, the Panel may, after giving the party an opportunity to be heard, invoke such sanctions as private reprimand, public censure or temporary or permanent deprivation of enjoyment of the facilities of a stock exchange as it deems fit.

In this particular case the Panel invoked public censure against all those minority shareholders whom it held to be concerted parties. After the censure the 1st and 2nd defendants decided to liquidate their respective shares in the plaintiff company and accordingly sold their shares in the open market. When the share certificates were duly presented to the plaintiff company to be registered the plaintiff company declined to do so, as they were of the view that inspite the public censure the 1st and 2nd defendants still needed to comply with r. 34.7 of the Code. The 1st and 2nd defendants, however, took a different view. They are of the view that since the Panel had publicly censured them the restriction imposed by r. 34.7 of the Code ceased to operate.

The plaintiff appeared to be happy with the Panel's decision and the defendants, though adversely affected by the decision, did not challenge the decision, as they were of the view that by virtue of s. 179(8) of the Act which provides that the decision of the Panel is final and not capable of being challenged in any Court, they had no right of appeal.

The plaintiff, however, took upon themselves and by a letter dated 21 August 1991 sought a ruling of the Panel on the effect of r. 34.7 in the light of the public censure, presumably with the hope that the Panel would agree with their view that inspite of the public censure, r. 34.7 still operates. Unfortunately, however, the Panel replied that r. 34.7 ceased to have any operative force as the concerted parties had been punished by the public censure.

The plaintiff certainly did not like this reply and on advice of leading Counsel disagreed with the Panel's ruling. Now having themselves sought the Panel's ruling the plaintiff contends that the Panel embarked on an interpretation of the Act itself, that is, s. 179(7A) by interpreting the legal effect of the imposition of the censure. The plaintiff contends that this being a matter of law is purely outside the Panel's statutory jurisdiction. The plaintiff appears to be happy and accepted the Panel's ruling when it was in their favour as being within the Panel's jurisdiction but when the second ruling turned out not to be in their favour they now challenged the ruling as being outside the Panel's jurisdiction. The plaintiff appears to be blowing hot and cold on the matter. I wonder what the plaintiff's stand would be had the Panel agreed with the plaintiff's views?

The plaintiff also took the view that the ruling by the Panel on the effect of r. 34.7 is not a decision of the Panel and as such s. 179(8) of the Act has no application. Alternatively the plaintiff contends that if the ruling is a decision, the Panel has actually embarked on matters outside their jurisdiction.

Having studied the set up, the power, functions and authorities of the Panel I am of the view that the Panel is vested with full authority by s. 179 of the Act to issue rulings on the interpretation of the general principles and rules (s. 174(3)(a) and (4)(a)), it has power to lay

down the practice to be followed by the parties concerned in take over and merger transactions. It has the general jurisdiction to administer the Code it formulated and may do anything for the proper exercise of its functions.

The Panel itself formulated the Code on Mergers and take overs. Rule 34.7 is the rule made by the Panel itself and as such it must also have authority to interprete that rule. The Panel is also immuned from legal proceedings with respect to anything done or omitted to be done in the exercise of its functions, duties and powers [s. 174(9)].

It cannot therefore be said that the Panel has in fact interpreted the law, that is, s. 179(7A) as argued by the plaintiff. What the Panel has done at the behest of the plaintiff themselves, is simply to interprete r. 34.7. This was what the plaintiff sought in the first place. Therefore when the Panel gave its decisions on the effect of r. 34.7 as requested by the plaintiff, it is doing no more and no less than interpreting the rule which in fact is its domain.

The next matter to be decided is whether as contended by the defence s. 179(8) of the Act applies. This section states clearly that the decision of the Panel shall be final and not capable of being challenged in any Court. In the light of this section it is therefore necessary to examine the law relating to the jurisdiction of the Court to intervene in the decision making authority of the Panel.

It is the plaintiff's argument that the ouster clause contained in s. 179(8) is not strong enough to oust the jurisdiction of the Court. Now prior to 10 June 1988 the High Court was vested with all the judicial power of the State. Then on 10 June 1988 a fundamental change took place when Article 121(1) of the Constitution was amended whereby the jurisdiction of the High Court was limited to that which is to be conferred by any Federal law. The amendment had taken away the judicial powers of the High Court. This is a complete reversal of the position in England where under the unwritten Constitution all judicial powers were vested in the High Court. Thus I agree with the submission of the Counsel for the defence that the decisions of the English Courts which proclaimes that the High Court in England as being the final arbiter of all legal disputes may no longer be applicable in Malaysia.

Whilst the Courts had accepted the principle that a subject's recourse to the Courts for the determination of his rights is not to be excluded except by clear words, we must therefore look at the provisions which attempted to bar such a recourse. On my reading of ss. 179(2), 4(a), (8) and (9) of the Act it makes it abundantly clear that the power of interpretations of the general principle, and rules are solely vested in the Panel. Therefore by this very fact of vesting the power of interpretation on the Panel legislature has taken away the jurisdiction of the Court to interpret generally. Thus it seems to me plain and clear that the amendment of Article 121(1) of the Constitution has become a reality as Federal law has decided that the interpretative powers of the Courts shall be with the Panel. It is therefore my view that the words in s. 179(8) coupled with ss. 179(2), (4)(a) and (9) makes it clear that the decision of the Panel in the exercise of its functions in respect of the general principles and rules in the Code shall be final and not capable of being challenged in the Courts. The plaintiff's application for declaration is hereby dismissed with costs.

Also found at [1992] 4 CLJ 1878